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No. 05-1126

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Counsel for BellSouth Corporation

TIMOTHY BEYER
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116
Counsel for Qwest Communications International Inc.

November 9, 2006

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc.

(additional counsel listed on inside cover)

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790
Counsel for Qwest Communications International Inc.

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 4th Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

CORPORATE DISCLOSURE STATEMENTS

Petitioners' Rule 29.6 Statements were set forth at page iii of their opening brief, and there are no amendments to those Statements.

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INTRODUCTION

Respondents concede that a bald assertion of "conspiracy" cannot suffice on its own to state a claim under Section 1 of the Sherman Act: the bare invocation of the statutory standard fails to "show[] that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Instead, in a complaint such as this one, which is based solely on "observations of public conduct and market circumstances," Resp. Br. 21, the pleaded facts must support an inference – as respondents put it, be "genuinely suggestive," *id.* – of conspiracy. That standard, whatever form of words is used to formulate it, requires a court to evaluate the pleaded facts in light of the substantive legal standards governing the claim.

The allegations in the complaint in this case, which respondents all but ignore, fail to support any reasonable inference that petitioners conspired. The allegations here lie at the opposite end of the spectrum from conduct that "*would* be strongly suggestive of conspiracy," such as simultaneously undertaken "complex and historically unprecedented changes in pricing." *Id.* at 37. The complaint alleges that petitioners *failed* to undertake a "historically unprecedented change[]" in their local telephone businesses by suddenly competing out-of-region as CLECs and failed to comply with burdensome sharing demands intended to assist competitors. Substantive antitrust law teaches that such allegations cannot support an inference that petitioners conspired, because these facts do not even "tend to exclude" the obvious *unilateral* explanation for the conduct, *i.e.*, pursuit of self-interest independently determined. To permit such a case to proceed would penalize efficient conduct, imposing unwarranted burdens on innocent defendants, without any deterrence benefit.

It is left to amici to argue that respondents did not have to plead *any* facts in support of the critical agreement element of their claim under Section 1 – that "general or conclusory allegations suffice." Lerach Br. 11. That extreme position would effectively nullify Rule 12(b)(6), as virtually no complaint could ever be dismissed for failure to state a claim, and

is contrary to the plain terms of Rule 8 and *Conley*, which require that a complaint disclose "what the plaintiff's claim is *and the grounds upon which it rests*." 355 U.S. at 47 (emphasis added). It is inconsistent with *Papasan*, which holds that a court need not accept a legal conclusion as fact, and with repeated decisions of this Court requiring dismissals of inadequate complaints. It would overrule the governing law of every circuit, *see* Pet. Br. 17 & n.1; U.S. Br. 14 n.14, which requires district courts to distinguish between well-pleaded factual allegations on the one hand and conclusory assertions and unwarranted inferences on the other in evaluating the sufficiency of a complaint. And it contradicts *Associated General Contractors*, which holds, specifically in the context of a complex antitrust case, that it is *improper* for a court to assume the existence of facts "not alleged."

Applying established, not "heightened," pleading standards and this Court's antitrust principles, the district court properly dismissed the complaint. This Court should reinstate that judgment.

ARGUMENT

I. RULE 8 AND THE DECISIONS OF THIS COURT REQUIRE PLEADING OF FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF

A. Respondents concede that, in evaluating the sufficiency of a complaint, it is the factual allegations, not the legal conclusions or labels that a plaintiff may attach to them, that must be evaluated to determine whether the complaint states a claim. Nowhere in their brief do respondents argue that the bare allegation that defendants "agreed" satisfies the standards of Rule 8. Indeed, respondents acknowledge that "[m]any cases involving asserted 'parallel conduct'" – inevitably accompanied by the required assertion that defendants agreed – "are likely to fail" under the standard that respondents defend. Resp. Br. 37.

Respondents thus do not subscribe to the arguments of amici that the Federal Rules require only "enough factual

detail for the defendants to understand the nature of the case against them, and for the Court to *hypothesize* that *some* set of facts *might* be proved to warrant relief." Lerach Br. 9 (first and third emphases added). This standard would mean that no claim of concerted action could ever be dismissed, because it is always possible to *hypothesize* that ostensibly unilateral action is the result of an agreement. And amici are wrong in arguing that *Conley* supports their standard.

When this Court said in *Conley* that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim," 355 U.S. at 45-46, it was addressing the *legal* sufficiency of the facts *alleged*, without regard to other, possibly extenuating facts. *See* Pet. Br. 28-29. Immediately after the quoted language, the opinion says that

> the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. *If these allegations are proven* there has been a manifest breach of the Union's statutory duty[.]

355 U.S. at 46 (emphasis added). Similarly, when the Court considered the union's separate argument that the complaint "failed to set forth specific facts to support its general allegations of discrimination," the Court rejected it without suggesting that wholly conclusory allegations were adequate. Rather, it held that the facts alleged were plainly sufficient to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. The complaint in *Conley* covers 15 single-spaced pages in this Court's transcript;[1] given the detailed factual allegations of discrimi-

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[1] Among other claims, the complaint detailed the abolition of 45 jobs held by the plaintiffs (who had been segregated into a separate Union Local) and the creation of corresponding jobs that were filled first by white employees with no experience. In the words of the complaint, "the afore-

natory conduct, summarized earlier in its opinion, *id.* at 42-43, the Court properly brushed aside the union's "lack of specificity" argument.

Amici's proposed standard is contrary to the Federal Rules, the decisions of this Court, and the unanimous views of the courts of appeals. *See* Pet. Br. 16-23. The very function of a Rule 12(b)(6) motion is to weed out complaints that allege only lawful conduct: district courts must dismiss complaints that fail "to state a claim upon which relief can be granted." That inquiry requires a comparison of the facts alleged (not hypothesized facts) to the legal standard governing some cognizable claim. As we demonstrated in our opening brief, time and again this Court has affirmed dismissal of complaints that fail to allege facts material to the plaintiff's claim, despite the assertion of the ultimate legal conclusion. *See, e.g.*, *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Papasan v. Allain*, 478 U.S. 265 (1986); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Wilson v. Schnettler*, 365 U.S. 381 (1961). Amici's argument that dismissal is improper unless a complaint itself recites facts that affirmatively *foreclose* any claim for relief is

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mentioned jobs, which were all freight handlers jobs, were not abolished, for persons were immediately hired to perform said jobs, doing the same type and class of work that plaintiffs . . . had done prior to their discharge. . . . [M]any persons of the white race were hired on these jobs and subsequently some of those who had been previously fired, who are Negroes . . . [,] were rehired, with no seniority, and junior to all the white persons who had been previously hired but who had never before performed this work." Tr. 12, No. 7. By contrast, "none of the white employees represented by the [union] have been so discharged or displaced." Tr. 12-13. The complaint further alleged that "said acts constituted a planned course of conduct designed to discriminate against them because of their race or color" and that the union refused "to give to plaintiffs protection or any protection from said discrimination equal to that afforded to members of the white race . . . represented by the [union]." Tr. 13.

grounded entirely on a phrase from *Conley*, wrenched out of its context, and would have required a result different from that reached in the cited cases.[2]

B. Respondents and their amici repeatedly claim that petitioners, the United States, the American Bar Association, and other amici seek in this case to erect "heightened pleading standards" for antitrust claims. Their insistence on this point substitutes epithet for argument. We have made clear from the start that our contention is that the complaint fails under ordinary Rule 8 standards.

Accordingly, neither *Swierkiewicz* nor *Leatherman* supports respondents, because neither case dispenses with the ordinary requirement that a complaint must contain factual allegations "on every material point necessary to sustain a

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[2] When this Court has drawn on *Conley*'s language, it has never done so to hold that a district court must accept a conclusory allegation comparable to the bare assertion of "conspiracy" at issue here. Some of the cases cited by amici have nothing to do with the failure to plead material facts. For example, in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), the issue was whether the employment-discrimination bar of Title VII reaches selection of partners for a partnership; the Court held that it does and said that the plaintiff was thus entitled to "her day in court *to prove her allegations*." *Id.* at 79 (emphasis added). Other cases involved factual allegations of injury or effect on interstate commerce that comfortably supplied the required basis to proceed. *See, e.g., National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) (allegation of injury sufficient to establish standing where plaintiffs alleged that defendants had "conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere" and had "threatened [the plaintiff's] clinic administrator with reprisals if she refused to quit her job at the clinic"); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743-47 (1976) (effort to monopolize market for provision of health services had effect on interstate commerce); Pet. Br. 18 (discussing *United States v. Employing Plasterers' Ass'n of Chicago*, 347 U.S. 186 (1954)). *See also* James, *Civil Procedure* § 3.9, at 196-97 ("The nearer the allegation is to the heart of contentions important to the case, the stronger the insistence on further detail. . . . The more readily the fact alleged corresponds to common experience, the less detail is likely to be required[.]").

recovery." 5 Wright & Miller, *Federal Practice and Procedure* § 1216, at 220-27. In *Swierkiewicz*, the complaint both identified a specific employment action and described the nature of the alleged discrimination: demotion and other adverse employment action on account of the employee's age and national origin. If the adverse action was in fact taken with discriminatory intent (as alleged), Mr. Swierkiewicz had a claim. The complaint specifically identified the transactions at issue, with names, dates, and places, making it straightforward for the defendant to investigate and defend against the claim. *See* 534 U.S. at 514 ("His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest.") (citation omitted). The complaint here includes no such facts regarding the circumstances of any supposed agreement.

The Second Circuit in *Swierkiewicz* had upheld dismissal based exclusively on the mistaken proposition that a discrimination plaintiff is *required* to establish a circumstantial (that is, indirect) case under *McDonnell Douglas*. This Court rejected that requirement, pointing to the "detailed" *direct* allegations of discrimination in the complaint.[3] The Court did not "relieve[] the plaintiff of the requirement to allege a factual predicate sufficient to provide notice and to

[3] Thus, the plaintiff alleged that he was "a native of Hungary" and "53 years old," that the chief executive of his employer was a "French national," that the plaintiff performed his job in an "exemplary manner," that, despite his "stellar performance," he was "demoted" and his responsibilities transferred to a "French national" who was "32 years old at the time," that the demotion was "on account of his national origin . . . and his age," that he was discriminated against in various other ways in the allocation of duties within the company, that he was fired without "valid basis," and that "age and national origin were motivating factors" in his firing. *Swierkiewicz* JA 5a-9a, No. 00-1853. This is nothing like the bare assertion of conspiracy at issue here.

demonstrate a reasonable basis for inferring that the defendant may have engaged in wrongful conduct." U.S. Br. 16. Notably, the United States, having supported the plaintiff in *Swierkiewicz*, agrees with petitioners and the district court that plaintiffs in this case did not meet the Rule 8 standard.

In *Leatherman*, the Court noted that a district court is required to accept "*factual* allegations," 507 U.S. at 164 (emphasis added), but did not hold that a plaintiff is relieved of the requirement of pleading the factual "grounds" upon which a complaint rests, *Conley*, 355 U.S. at 46. Respondents argue that *Leatherman* rejects the proposition that an evaluation of the sufficiency of a complaint's factual allegations depends on the law governing the claim. Resp. Br. 24. In fact, *Leatherman* does not even discuss the sufficiency of the factual allegations of the complaint under Rule 8; the Court remanded, without reaching that question, because it was "quite evident" that the Fifth Circuit had applied a "heightened pleading standard" that required the plaintiff to plead around "the defense of immunity." 507 U.S. at 167. *See also* U.S. Br. 12 n.4. The Court in *Leatherman* thus did not alter the well-established principle that "the appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case." 5 Wright & Miller § 1218, at 273; *see also* Charles E. Clark, *Handbook of the Law of Code Pleading* 232 (2d ed. 1947) ("If we take as our test the requirement of fair notice of each material fact of the pleader's cause, it must follow that our solution should vary with the case presented. . . . The particularity of allegation should vary with the question at issue.") (footnote omitted); *see also id.* at 241 ("[t]he above analysis . . . now finds its most complete exemplification in the Federal Rules").

In this case, as the United States correctly emphasizes, "agreement is the critical factor distinguishing innocuous parallel conduct from a Section 1 violation." U.S. Br. 8. Nothing is easier than claiming that parallel conduct was the result of an agreement, and for that reason courts do and must

"insist on more than mere conclusory allegations of that element." *Id.*; *see DM Research*, 170 F.3d at 56 (allegation of "'conspiracy'" or "'agreement'" insufficient absent "more specific allegation[s]"). The allegation of agreement here is an extreme example of a conclusory assertion that is properly disregarded. The Second Circuit acknowledged that the complaint alleges no "specific instances of conspiratorial conduct or communications," Pet. App. 31a, and that is an understatement: the *only* fact that the complaint alleges with regard to the supposed agreement is that it began "at least as early as February 6, 1996," JA 30 (Am. Compl. ¶ 64), the date the Telecommunications Act of 1996 became law. Without any facts, such an assertion of agreement is nothing more than a naked conclusion.

II. ABSENT OTHER FACTS SUGGESTIVE OF AGREEMENT, ALLEGATIONS OF PARALLEL CONDUCT DO NOT SUPPORT A CLAIM OF CONSPIRACY UNLESS THEY "TEND TO EXCLUDE" THE POSSIBILITY THAT DEFENDANTS ACTED UNILATERALLY

Respondents defend the Second Circuit's standard on the basis that allegations of parallel conduct state a claim under Section 1 so long as they admit of a "reasonable *possibility*" that defendants conspired, Resp. Br. 18, 20, 29, *i.e.*, unless the hypothesis that such conduct is the result of a conspiracy falls below a "threshold of implausibility," *id.* at 22. In an attempt to reach their own complaint, respondents then insist that plaintiffs need only posit a "'plausible' motive" for plaintiffs to agree. *Id.* at 37. That standard conflicts with the Federal Rules and with substantive antitrust standards.

A. The fundamental requirement of Rule 8 is that a complaint set forth a "short and plain statement of the claim showing that the pleader *is* entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). It is thus plainly *in*sufficient to allege that there is merely a reasonable possibility that the pleader *may be* entitled to relief. *See, e.g.*, James, *Civil*

Procedure § 3.6, at 189 (Federal Rules do not permit complaints based on claims that there is "reason to believe that, upon evidence which may be disclosed by discovery, the pleader may be entitled to relief").[4]

That principle is embodied in the Court's holding in *Dura* that a complaint fails to state a claim unless the allegations support a "'reasonably founded hope'" that discovery will reveal evidence in support of the claim. 544 U.S. at 347 (quoting *Blue Chip Stamps*, 421 U.S. at 741). The issue faced by the Court in *Dura* was closely analogous to the issue here: the complaint alleged that the plaintiffs had purchased stock at an inflated price and were "damaged thereby." *Dura* JA 59a-60a, No. 03-932. Though nothing in the complaint was inconsistent with the *hypothesis* that the plaintiffs had suffered an economic loss proximately caused by the defendants' alleged fraud, neither did the complaint plead facts sufficient to support that hypothesis. The Court unanimously ruled that the complaint was inadequate because the plaintiffs' failure to allege the essential facts would have required the Court to *supply* (or hypothesize) the missing allegations.

Here, too, the district court correctly held that it could not reasonably draw the necessary inference from the allegations in the complaint. Respondents expressly pleaded their conspiracy claim as an inference to be drawn from "observations of public conduct and market circumstances." Resp. Br. 21; *see* JA 27 (Am. Compl. ¶ 51) (expressly identifying the conspiracy allegation as one made "upon information and belief"). Specifically, respondents sought to rely on an inference, to be drawn in light of market circumstances, that

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[4] Congress has given the Department of Justice ("DOJ"), but not private litigants, authority to investigate upon mere "reason to believe" that a person has information "relevant to a civil antitrust investigation." 15 U.S.C. § 1312(a). The pertinent committee report noted that, "because of their speculative approach and unduly prejudicial impact, investigations by means of 'skel[e]ton' complaints have been universally condemned as a *perversion of the Federal Rules of Civil Procedure*." H.R. Rep. No. 94-1343, at 6 (1976) (emphasis added).

the alleged parallel conduct was the result of an agreement. Because the facts alleged do not support such an inference, the complaint was properly dismissed.

Respondents claim that their "reasonable possibility" standard finds support in this Court's statement in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), that a complaint may proceed even if "it . . . appear[s] on the face of the pleadings that a recovery is very remote and unlikely." *Id.* at 237. The argument confuses the principle that pleaded facts must be accepted as true even if they appear unlikely, which *Scheuer* confirms, with the requirement that plaintiffs plead sufficient facts to show they are entitled to relief, which *Scheuer* leaves unaltered. In the present case, the complaint is deficient not because it alleges improbable facts, but because its factual allegations, taken as true and drawing all reasonable inferences in favor of plaintiffs, fail to support the conclusion of conspiracy and thus fail to state a claim for relief. *See* Pet. Br. 23-25. As the United States puts it, when a plaintiff seeks to rely on inferential allegations of conspiracy, the facts alleged must provide "a reasonably grounded expectation that discovery will reveal evidence of an illegal agreement." U.S. Br. 23.

B. Whether particular allegations of parallel conduct support a reasonable inference of conspiracy is a determination that must be made with reference to substantive antitrust standards. At the threshold, of course, the allegation that defendants acted in parallel (even if they did so "consciously") is not by itself enough to state a claim; such parallel conduct is "not in itself unlawful." *Brooke Group*, 509 U.S. at 227. Furthermore, most parallel conduct, in the absence of additional circumstances, does not suggest that defendants reached any agreement: parallel conduct is ubiquitous, as similarly situated businesses react to comparable incentives. *See* Economists' Br. 7-9. "[T]here is no basis for inferring any kind of agreement from . . . mere parallel behavior." 6 Areeda & Hovenkamp, *Antitrust Law* ¶ 1410a, at 60; U.S. Br. 20-21. Indeed, respondents seem to recognize this funda-

mental proposition, conceding that "[m]any cases involving asserted 'parallel conduct' are likely to fail." Resp. Br. 37.

Respondents' argument that a "plausible motive" to conspire supplies sufficient basis for inferring that an agreement existed is incorrect for the same reason. Just as parallelism does not suggest that there is an agreement, neither does the nearly ubiquitous fact that defendants might have secured some potential benefit from agreeing. The "mere existence of mutual economic advantage" "supplies *no basis* for inferring a conspiracy" because it "does not tend to exclude the possibility of independent, legitimate action." *Serfecz*, 67 F.3d at 600-01; *see also, e.g., DM Research*, 170 F.3d at 58 (dismissing claim against standards-setting organization despite existence of motive to conspire). It is almost always possible to hypothesize a potential advantage from coordination with competitors. *See* Pet. Br. 31-32 & n.2; U.S. Br. 27 ("[A]n abstract opportunity and some incentive to conspire almost always exists among competitors, so alleging such a truism does nothing to create a reasonably grounded expectation that discovery will reveal that petitioners agreed to do what is conceded to be in their self-interest in any event."). The existence of such potential advantage does not suffice to distinguish allegations of lawful conduct from allegations of unlawful conduct.

C. Respondents argue that to require that allegations of parallel conduct "tend to exclude" the possibility of unilateral conduct is the same error that led this Court to reverse in *Swierkiewicz*. Resp. Br. 26-27. That is, respondents argue, because a Section 1 plaintiff need not *prove* an "inferential case" "if direct evidence is available instead," *id.*, it is wrong to require that a plaintiff's factual allegations support an inference of conspiracy at the pleading stage. But this argument avoids the issue. A plaintiff *can* plead facts directly identifying an agreement, but respondents simply have not done so. *See* Pet. Br. 6-7. Respondents deliberately chose to plead their conspiracy claim on the basis of "observations of public conduct and market circumstances." Resp. Br. 21.

Once they did so, the facts alleged had to support the claim of agreement under the "tend to exclude" standard that governs such inferences.

It is easy to point to circumstances that would "tend to exclude" the possibility of unilateral action. Respondents propose one such example – "complex and historically unprecedented changes in pricing." *Id.* at 37. In the absence of unusual facts, one would not expect several competitors to adopt a "complex and historically unprecedented change[] in pricing" simultaneously and spontaneously. *See* 6 Areeda & Hovenkamp ¶ 1425a, at 167 (noting that some "parallel behavior . . . would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding"). The United States proposes another such circumstance – identical actions taken directly after a "particular jointly attended meeting[]." U.S. Br. 23; *see* 6 Areeda & Hovenkamp ¶ 1425e5, at 182-83 (discussing *J&J Furniture & Sleep Shop v. Sealy Southeast*, 1981 Trade Cas. ¶ 64,166 (S.D. Tex.)). One can imagine other examples.

The complaint at issue here, however, involves no such allegations. Far from alleging a complex and historically unprecedented *change* in behavior, the complaint alleges that petitioners failed "meaningful[ly]" to enter new markets, maintaining the status quo. JA 21 (Am. Compl. ¶ 39); *see* U.S. Br. 21 ("Parallel *inaction* is even less suggestive of illicit agreement."). Respondents do not even argue that allegations of inadequacies in petitioners' network-sharing are sufficient on their own to support an inference of conspiracy. *See also* Pet. Br. 32 n.3. And there are no allegations of any specific meetings or other communications, followed by any particular marketplace actions. *See id.* at 37 n.6.

The proffered basis for the claim of agreement here is quite different: the complaint alleges that petitioners' failure to compete meaningfully as out-of-region CLECs "would be anomalous in the absence of an agreement." JA 21 (Am.

Compl. ¶ 40). The reference to *Matsushita* and its progeny (which require facts that "tend to exclude the possibility" that the alleged conspirators acted independently) is unmistakable. The complaint itself thus recognizes the principle that allegations of parallel conduct do not support a claim of conspiracy *unless* the behavior would be contrary to the defendants' legitimate economic self-interest (would be "anomalous") absent conspiracy. *See* Pet. Br. 24-25.[5] But, having invoked the relevant legal standard, the complaint fails to allege the types of circumstances that would satisfy it. *See infra* pp. 18-20.

D. Respondents and their amici argue that Section 1 plaintiffs should be relieved of the ordinary pleading burdens because there is little risk of nuisance antitrust litigation and because private civil litigation initiated in the absence of supporting factual allegations provides important cartel deterrence. Both aspects of this argument are incorrect.

1. The costs and burdens imposed by meritless litigation – particularly class action litigation, where plaintiffs have no risk of counterclaims or harm to business and where discovery burdens are borne almost exclusively by defendants – are too well documented to require or to allow great elaboration here. Respondents' claim that antitrust litigation is somehow

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[5] *Matsushita* holds that "*antitrust law* limits the range of permissible inferences from ambiguous evidence in a § 1 case." 475 U.S. at 588 (emphasis added). In the words of Professor Miller, *Matsushita* "was basing its decision on *underlying substantive antitrust law* rather than employing a new summary judgment standard." Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1030 (2003) (emphasis added). The same substantive antitrust law properly informs a district court's evaluation of the reasonableness of inferences from allegations of parallel conduct. *See* U.S. Br. 21 (explaining, in light of governing antitrust principles, that "factual allegations indicating only that defendants engaged in parallel conduct" joined with "an unadorned allegation of the existence of a 'conspiracy' or an 'agreement'" fail to state a claim).

an *exception* to this rule, *see* Resp. Br. 12-17, is nonsense.[6] The United States, the states' attorneys general, and the American Bar Association have urged this Court to reverse the Second Circuit's decision precisely because, by failing to require adequate factual allegations in support of an antitrust conspiracy claim, the court's standard "perversely risks turning a sign of healthy competition [parallel conduct] into a green light for strike suits and *in terrorem* settlement demands." U.S. Br. 25; *see* State AGs' Br. 1 ("the standard adopted by the court below will encourage plaintiffs to file first and investigate later"); ABA Br. 11 ("A lack of adequate threshold requirements . . . not only may waste substantial resources but may create unfortunate incentives for parties to bring speculative claims with the expectation of achieving a settlement prior to the summary judgment stage.").

The claim of amicus AAI that "[f]ormal models do not predict" the filing or settlement of unmeritorious claims is simply wrong. AAI Br. 4.[7] Those models confirm what experience demonstrates: that, if the bar is lowered to barebones antitrust pleadings, the incentive to file unmeritorious litigation will ensure a steady stream of frivolous suits. If a plaintiff can secure certification of a class – even if the

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[6] *See, e.g.*, Herbert Hovenkamp, *The Antitrust Enterprise* 59 (2005) ("many marginal and even frivolous antitrust cases are filed every year, and antitrust litigation is often used as a bargaining chip"); Richard Posner, *Antitrust Law* 275 (2d ed. 2001) ("class action[s] permit[] class-action lawyers to make plausible though not necessarily valid arguments for damages so immense that even though the probability that a court would award anywhere near the amount sought is very slight, the expected cost of the suit . . . may be sufficient to induce a settlement").

[7] *See, e.g.*, William Breit & Kenneth G. Elzinga, *Antitrust Penalty Reform* 39 (1986) (noting that plaintiffs are spurred to file frivolous suits "in the hope that defendants will pay some money rather than engage in the expense of litigation (and incur the chance of judicial error)"); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1029 (1986) (noting that "extortion tactics are more credible when the adversary's costs can be raised *relative* to the increase in the extortionist's own costs").

underlying case is without merit – the pressure to settle (like the potential fee award to the class action lawyer) becomes enormous. Few firms can accept even a very small risk of nationwide liability and treble damages.[8]

2. Respondents and their amici also make the flip-side argument that vacuous antitrust complaints should be allowed to proceed because conspiracies are difficult to detect and the deterrence value of private suits is great. *See* Resp. Br. 22-23; AAI Br. 7-11.[9] The argument is not valid generally or in the circumstances of this case.

First, requiring factual allegations to support a claim of conspiracy will not discourage non-speculative litigation. Where "public conduct and market circumstances" support an inference of conspiracy, those facts are available to a plaintiff upon reasonable investigation. The two meritorious cases that AAI claims would have been "prevented" by application of ordinary pleading standards, AAI Br. 13-15, bear this out. In both, the plaintiff included concrete factual allegations that plainly suggested agreement.[10] Encouraging

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[8] *See* Franklin M. Fisher, *Economic Analysis and Antitrust Damages*, 29 World Competition 383, 392 (2006) ("Because of treble damages, the defendants' exposure if a large class is certified can become enormous. Hence there is great pressure on them to settle, and this is what usually happens. . . . This phenomenon . . . encourages the bringing of unmeritorious cases. It has, I believe, led to a sort of legal piracy.").

[9] No decision of this Court supports the claim that a lower pleading standard applies to claims of conspiracy. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), a pre-*Matsushita* summary judgment case, did not address the existence of an agreement; it addressed the question whether the defendant network could cancel an affiliation agreement with a local station pursuant to a conspiracy (a matter that the Court held turned on "motive and intent," *id.* at 473, not the existence of agreement, which was essentially uncontested). And both *Hospital Building* and *Radovich v. NFL*, 352 U.S. 445 (1957), involved the sufficiency of facts to show an effect on interstate commerce. *See supra* note 2.

[10] In *Strobl v. New York Mercantile Exchange*, No. 79 Civ. 1834 (S.D.N.Y. filed Apr. 6, 1979), the complaint alleged a conspiracy to corner the market in two specific potato future contracts and to manipulate

random litigation would not deter unlawful conduct, but would significantly penalize lawful conduct. *See* Economists' Br. 11-18.

Second, antitrust enforcement authorities confirm that speculative complaints do not "serve th[e] end" of deterring cartel behavior. U.S. Br. 1. According to the Government, "the vast majority of private suits against cartels[ ] are follow-on actions triggered by the government's exposure of a cartel." Brief for the United States and the Federal Trade Commission as *Amici Curiae* at 23, *Empagran, S.A. v. F. Hoffmann-Laroche, Ltd.*, No. 01-7115 (D.C. Cir. filed Feb. 16, 2005). Assuming that such follow-on private damages suits help to deter unlawful conduct, such suits – which piggy-back on government investigations and their exposure of pertinent facts – are not implicated here.

III. ALLEGATIONS OF PARALLEL *NON*-ENTRY THAT PRESERVES A PROFITABLE STATUS QUO DO NOT SUPPORT AN INFERENCE OF CONSPIRACY

Even under respondents' proposed standard, a claim of conspiracy must be dismissed if the allegation of conspiracy is "'unlikely speculation[ ]'" rather than some degree of "reasonable" inference from the alleged facts. Resp. Br. 21, 29. As the United States and the attorneys general of 16 states

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the market price of potatoes. The defendants' parallel *departures* from common and accepted business practice were the basis for the highly detailed complaint. *See* Compl. ¶¶ 52, 53; *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 367 & n.39 (1982) (describing dramatic departure from usual market behavior as a result of concerted manipulation). In *Pease v. Jasper Wyman & Son*, No. CV-00-015 (Me. Super. Ct. filed Feb. 28, 2000), the complaint alleged that defendant competitors *simultaneously* announced identical bid prices for the plaintiffs' wild blueberries and met annually at a specific location to agree on the bids. *See* Compl. ¶¶ 29 (defendants "set the same price at the same time"), 32(d) (annual price-fixing meetings "occurred at the Holiday Inn in Ellsworth, Maine, among other places").

have concluded, the allegations in this complaint do not support any such reasonable inference.

A. Respondents hardly defend the claim that the alleged inadequacies in petitioners' assistance to new entrants support an inference of conspiracy. In fact, rather than defend such allegations as sufficient, respondents argue that the allegations pass muster as a facet of the supposed "primary" conspiracy not to compete.[11] Respondents have thus implicitly conceded that allegations of parallel failure to assist CLECs do *not* suffice to state a claim as a free-standing conspiracy.

That concession illustrates petitioners' point: the inference of conspiracy from such conduct is unreasonable *not* because there is no conceivable benefit from such an agreement but because the conduct is so plainly consistent with unilateral self-interest in the *absence* of conspiracy. Every business has an interest in not making efforts to assist "competition in their respective . . . markets," JA 23 (Am. Compl. ¶ 47); indeed, one of the respondents brought suit against AT&T's predecessor *under Section 2* for *unilaterally* failing to facilitate local entry to preserve alleged market power, *see* Pet. Br. 5; *see also* Resp. Br. 41-42 (noting that counsel represented Section 2 plaintiffs against Verizon, SBC, and BellSouth).[12]

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[11] Respondents thus argue that the motive for "keep[ing] other CLECs out" was to create "a false appearance of unattractiveness of CLEC competition." Resp. Br. 49. But, taking as true the complaint's allegations that petitioners failed to facilitate CLEC entry, there was no "false appearance of unattractiveness"; CLEC competition *was* unattractive, as the complaint itself alleges. JA 11, 23-24 (Am. Compl. ¶¶ 4, 47).

[12] Respondents represent that counsel decided to bring this suit after reading a congressional letter asking the DOJ to investigate the possibility of an unlawful conspiracy. Resp. Br. 42. That letter does not contain *any* factual detail concerning an alleged conspiracy. *See* JA 46-49. Moreover, the Assistant Attorney General for Antitrust testified before Congress that he was "familiar" with the conduct that is cited in the letter (and the complaint) but did not believe it constituted evidence of an antitrust violation. *Antitrust Enforcement Agencies' The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the*

The unilateral motive for the alleged parallel conduct appears on the face of the complaint, which therefore cannot support the claim of agreement. *See* U.S. Br. 26-27.

B. Respondents ultimately rely on the allegation that entry into "surrounded territories" was "an especially attractive business opportunity" that petitioners did not pursue only because they so agreed. JA (Am. Compl. ¶ 41). According to respondents, petitioners' failure meaningfully to enter such areas as CLECs "would have been against their self-interest in the absence of a conspiracy" and thus suggests that petitioners conspired. Resp. Br. 43. Respondents' assertion that non-entry was against self-interest absent conspiracy, however, is no more than an inference or characterization, which is insufficient where, as here, it lacks reasonable support in the complaint's factual allegations.[13]

First, the very characterization of ILEC-as-CLEC entry as "especially attractive" is refuted by the complaint itself. The complaint alleges that entry as a CLEC was fraught with obstacles, including the successful resistance of ILECs. JA 11 (Am. Compl. ¶ 4); *see* JA 23-26 (Am. Compl. ¶ 47) (detailing alleged obstacles). Respondents apparently believe that the district court should have disregarded the specific factual allegations of the complaint and credited instead an inconsistent conclusory characterization – that entry was an

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House Comm. on the Judiciary, 108th Cong., 1st Sess. 77, 79 (July 24, 2003). He testified that, "[i]f at any time we think that we have evidence of a concerted agreement to allocate markets, or to decline to compete, we will act very aggressively against it," but stated that, while the Antitrust Division "monitor[s] this situation very closely," it was "not aware of evidence of any such agreement" by the ILECs. *Id.*

[13] *See Trinko*, 540 U.S. at 410 (rejecting argument that defendant's failure to provide adequate access to network facilities had "no valid business reason" when claim was unsupported by facts and contrary to other allegations in complaint); *DM Research*, 170 F.3d at 56-57 (rejecting argument that alleged conspirator would "benefit" from conspiracy when claim was unsupported by facts and appeared implausible in light of complaint's allegations).

"'especially attractive business opportunity.'" Resp. Br. 44 (quoting Am. Compl. ¶ 40 (JA 21)). But a plaintiff can plead facts that foreclose the plaintiff's claim, and respondents did so here. *See* Pet. Br. 34-36; U.S. Br. 29-30 ("a complaint can plead too much as well as too little and must be judged by the facts actually alleged").

Second, even if the ILEC-as-CLEC opportunity was in some sense "especially attractive" (an opportunity for a "quick buck"), that would not support an inference that petitioners' alleged failure to pursue that opportunity was a departure from ordinary, unilateral business conduct. Antitrust law reflects the basic understanding that businesses in general cannot possibly pursue more than a small fraction of the opportunities that might be characterized as "attractive." Pet. Br. 33-34; U.S. Br. 28-29. In this case, moreover, the complaint alleges that the particular opportunity was attractive only for so long as the regulatory regime on which it rested continued, *see* JA 21, 22 (Am. Compl. ¶¶ 39, 42), and petitioners were successfully challenging that very regime as unlawful.[14]

Beyond these two points – which are themselves sufficient to require dismissal of respondents' complaint – it is evident that respondents' ILEC-as-CLEC argument would not support an inference of collusion even on respondents' own logic. Respondents do not suggest that cross-border entry would be profitable *even if* the neighboring ILEC retaliated (if it were, then agreement would be irrational). Respondents rather claim that cross-border entry would be "especially attractive" only if other ILECs did not retaliate by likewise

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[14] *See also* JA 42 (Compl. Exh. D) (noting opinion of independent analyst that "[t]he [FCC] is studying current wholesale pricing policies and will likely adjust them," and "[a] company would be wise to wait until that happens before making a move"), 44 (Compl. Exh. E) (noting executive's statement that regulatory requirements "will be revised next year, making it unwise to base a business plan on it"); *Cooper v. Pickett*, 137 F.3d 616, 623 (9th Cir. 1997) ("a court ruling on a motion to dismiss may consider the full texts of documents which the complaint quotes only in part").

entering. *See* Cert. Opp. 20 (quoting a supposed "ILEC insider" asking "[w]hy would [the ILECs] want to start a cross-border battle?"). On that premise, however, there is plainly no *need* for collusion. It is obvious to each ILEC that any cross-border entry would be open and notorious and thus would provoke retaliation, as respondents pleaded and argued. *See* JA 26 (Am. Compl. ¶ 49); Cert. Opp. 20. Each ILEC could therefore be relied upon to decide independently, in its own best interest, against cross-border entry. Collusion is not suggested by each ILEC acting to maintain an existing pattern of service territories that is alleged to be profitable to all of the petitioners. *See* JA 26 (Am. Compl. ¶ 48 (referring to preservation of existing service territories as a "successful" business strategy)).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for reinstatement of the judgment of the district court dismissing the complaint.

Respectfully submitted,

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 4th Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

TIMOTHY BEYER
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790
Counsel for Qwest Communications International Inc.

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